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Department of Water Resources

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11 SAN LUIS & DELTA-MENDOTA
12 WATER AUTHORITY,

13 Plaintiff,

14 v.

15 UNITED STATES OF AMERICA,
16 DEPARTMENT OF THE INTERIOR,
et al.,

17 Defendants.

18
19 SAVE SAN FRANCISCO BAY
ASSOCIATION, et al.,

20 Plaintiffs,

21 v.

22 UNITED STATES OF AMERICA,
23 DEPARTMENT OF THE INTERIOR,
et al.,

24 Defendants.

25
26 FIXLEY IRRIGATION DISTRICT,
27 et al.,

28 Plaintiffs-in-Intervention.)

CASE NO. CIV F-97-6140 OWW
CASE NO. CIV F-98-5261 OWW
[CONSOLIDATED]

AMICUS CURIAE BRIEF OF THE
CALIFORNIA DEPARTMENT OF
WATER RESOURCES

Date: July 29, 1999

Time: 9:00 a.m.

Place: Courtroom 2

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[CONSOLIDATED]

AMICUS CURIAE BRIEF OF THE
CALIFORNIA DEPARTMENT OF
WATER RESOURCES

Date: July 29, 1999

Time: 9:00 a.m.

Place: Courtroom 2

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On July 14, 1999, the United States issued its Accounting and Interim Decision implementing Section 3406(b)(2) of the CVPIA, without previous consultation with the DWR (or with the California Department of Fish and Game, which is also expressly given a consulting role in the CVPIA) on the substance of the document or the accompanying "Accounting". Thus, the DWR, which should have had greater opportunity to consider the contents of the Interim Decision as a consulting State agency, has had only a few days to review it. Section 3406(b)(2) requires the federal project to dedicate and manage 800,000 acre-feet of Central Valley Project yield for fishery protection purposes. The July 14, 1999 decision, which was mandated by this Court's May 14, 1999 preliminary injunction order, purports to justify the United States' adoption of certain fishery protection measures during the current water year. This Court has set July 29, 1999 as the

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1 hearing date on the adequacy of the Accounting and Interim
2 Decision.

3 The DWR recognizes that the primary issue before this Court
4 is the propriety of the United States' current year accounting of
5 Central Valley Project yield under Section 3406(b)(2) of the
6 CVPIA. As important as this issue is to the parties before the
7 Court, the DWR, as manager of the State Water Project,
8 respectfully request this Court to consider two related issues
9 raised by the United States' Interim Decision regarding
10 coordination between the state and federal projects that have
11 bearing on the form of relief that this Court may issue.

12 Specifically, the DWR requests that if this Court orders
13 relief on behalf of either the plaintiff San Luis and Delta
14 Mendota Water Authority or the environmental plaintiffs, then
15 such relief should not come at the expense of the United States'
16 duty to offset any State Water Project water supply losses that
17 the state project may have incurred due to the two projects'
18 coordinated efforts to protect fishery resources in this water
19 year. The Interim Decision raises at least two, discrete issues
20 as to this matter that relate to the form of relief. First,
21 notwithstanding the language in the Interim Decision, the United
22 States should not limit its make-up obligation to the State Water
23 Project by any increased exports that the State Water Project may
24 have made incidental to Section 3406(b)(2) fishery releases by
25 the Central Valley Project. Second, the United States should
26 include as part of its make-up obligation to the SWP any impacts
27 to the State Water Project that are due to this year's
28

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1 coordinated federal and state efforts to comply with the
2 Endangered Species Act.

3 FACTUAL BACKGROUND

4 The Central Valley Project ("CVP") is a federal reclamation
5 project operated by the U.S. Bureau of Reclamation ("Bureau")
6 that provides water for irrigation throughout the California
7 Central Valley. The CVP includes 20 reservoirs, including Shasta
8 and Folsom reservoirs, 500 miles of canals, including the Delta
9 Mendota Canal, and other facilities. The Bureau has developed
10 some of these facilities as joint use facilities with the State
11 Water Project. These joint use facilities include San Luis
12 Reservoir, an off-stream storage reservoir south of the
13 Sacramento-San Joaquin Delta, and more than 100 miles of the
14 California Aqueduct. See DWR and U.S. Bureau of Reclamation,
15 Biological Assessment; Effects of the Central Valley Project and
16 State Water Project on Delta Smelt (1993) at 15, Administrative
17 Record ("A.R.") for the Central Valley Project Improvement Act,
18 Section 3406(b)(2) at 2672.

19 The State Water Project ("SWP") is a state facility operated
20 by the California Department of Water Resources that stores and
21 distributes water to areas in Northern California, the San
22 Francisco Bay Area, the San Joaquin Valley, and Southern
23 California. The SWP includes 14 reservoirs, including Oroville
24 Reservoir, the North Bay and South Bay aqueducts, and the
25 California Aqueduct, a canal facility extending more than 600
26 miles. Id.

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1 In 1986, the SWP and the CVP entered into an agreement
2 formalizing the two projects' long-standing practice of
3 coordinating their project operations. Under this Coordinated
4 Operations Agreement ("COA"),

5 "[b]oth the State and the United States are dedicated
6 to utilizing existing and future water conservation
7 facilities so as to provide the maximum benefits to the
8 people of California and the nation and believe that
9 through the coordinated and cooperative operation of
10 State and Federal facilities, these benefits can be
11 maximized." COA at 3-4, A.R. at 4193.

12 Congress has expressly confirmed the COA and directed the
13 Secretary of the Interior to execute and implement the agreement.
14 100 Stat. 3050 (January 21, 1986.) Thus, by agreement and by
15 statute, the CVP and the SWP must coordinate their project
16 operations.

17 ARGUMENT

18 I.

19 Any Relief Issued By This Court Should Not
20 Preclude The United States From Making-Up Any
21 Adverse Impacts To The State Water Project
22 Resulting From The United States'
23 Implementation Of Section 3406(b) (2)
24 Measures.

25 During the 1999 water year, the CVP and the SWP have
26 extended their coordination responsibilities under the COA to
27 include the implementation of certain Section 3406(b) (2)
28 measures. In a May 28, 1999 letter from U.S. Fish and Wildlife
Supervisor Wayne S. White to Lester A. Snow, Program Manager for
the CAL/FED Bay-Delta Program, the United States stated that:

"After reviewing the 1999 operations plan offered by
the CALFED Operations Group, the U.S. Fish and Wildlife
Service hereby proposes that CALFED acquire 50,000
acre-feet of water from parties on the Stanislaus River

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1 to assist meeting salmon and steelhead habitat
2 objectives. As you know, Interior has decided to
3 implement Delta Action 1 and 5 immediately. To carry
4 out these fish restoration measures, Interior needs the
5 cooperation of the State Water Project (SWP). We
6 believe that any impact to SWP water supplies from
7 implementing Delta Actions 1 and 5 needs to be made up.
8 We further believe that we can purchase water on the
9 Stanislaus River for make up that also has beneficial
10 independent fishery utility."

11 The United States' Interim Decision on implementation of
12 Section 3406(b)(2) of the Central Valley Project Improvement Act
13 (July 14, 1999) ("Interim Decision") confirmed this policy, but
14 then subjected it to certain new conditions. Under the provision
15 entitled "Coordination", the United States declared that:

16 "Interior's policy is that (b)(2) actions will not be
17 permitted to adversely affect the State Water Project
18 (SWP), operated by DWR, and that any adverse impacts
19 will be made up. However, this policy does not extend
20 to impact to the SWP that result from its obligations
21 under either the WQCP or Endangered Species Act. Any
22 gains that the SWP accrues from release of (b)(2) water
23 from upstream reservoirs will be credited against any
24 impacts to the SWP, as a result of (b)(2) actions that
25 would otherwise have to be made up." Interim Decision
26 at 9.

27 The DWR joins with the United States in supporting the first
28 sentence of this provision of the Interim Decision and asks that
the Court, in fashioning relief, refrain from modifying this
sentence. However, as the following will explain, the DWR
strongly objects to the new conditions imposed by the Interim
Decision on the United States' make-up obligation to the SWP.

//

1. Pursuant to Rule 201 of the Federal Rules of Evidence,
Amicus Curiae DWR respectfully requests this Court to take
judicial notice of the May 28, 1999 letter from Wayne S. White to
Lester A. Snow, a true and correct copy of said letter is
attached to this memorandum as Exhibit A.

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1 II.

2 In Determining The Amount Of Make-up Water Owed
3 To the SWP, The United States Should Not Offset
4 Gains Accruing To The SWP From Releases Of Section
5 3406(b)(2) Water Against The Water Supply Losses To
6 The SWP From The Implementation Of Section 3406(b)(2)
7 Measures.

8 The SWP/CVP "Coordination" provision of the Interim Decision
9 conditions the United States' make-up obligation to the SWP on
10 the following requirement:

11 "Any gains that the SWP accrues from release
12 of (b)(2) water from upstream reservoirs will
13 be credited against any impacts to the SWP,
14 as a result of (b)(2) actions that would
15 otherwise have to be made up." Interim
16 Decision at 9.

17 For the following reasons, the DWR submits that this requirement
18 is erroneous and that the Court should not adopt it, implicitly
19 or explicitly, in any relief that the Court may grant in this
20 proceeding.

21 First, this requirement is inconsistent with the intent of
22 the CVPIA. Section 3406(b)(2) requires the Secretary of the
23 Interior to dedicate and manage 800,000 acre-feet of CVP yield
24 for the "primary", but not exclusive purpose of fishery
25 protection. 106 Stat. 4705, 4715. The United States' 1997
26 Administrative Proposal regarding management of Section
27 3406(b)(2) water expressly "assumed that water released for a
28 fish and wildlife objective upstream will be available in the
Delta for consumptive purposes unless the measures in Appendix A
or other existing environmental requirements provide an explicit
additional fish and wildlife requirement for that water. . ."
A.R. at 10849.

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1 Second, the Interim Decision language is inconsistent with
2 the Agreement between the United States of America and the
3 Department of Water Resources of the State of California for the
4 Coordinated Operation of the Central Valley project and the State
5 Water Project (commonly known as the Coordinated Operations
6 Agreement or "COA"). Article 6, Clause (h) and Clause (i) on
7 page 12 of the COA state that:

8 "(h) Availability of Storage Withdrawals to
9 the Other Party: Unless otherwise agreed,
10 whenever a party's storage withdrawal
11 available for export is greater than its
12 export capability, the difference shall be
13 available for export by the other party
14 without affecting either party's future
15 responsibility for providing storage
16 withdrawals to meet Sacramento Valley inbasin
17 use.

18 (i) Availability of Unstored Water for
19 Export to the Other Party: Unless otherwise
20 agreed, whenever a party's share of unstored
21 water for export exceeds its exports, the
22 unusable portion is available for export by
23 the other party without affecting either
24 party's daily sum of stored water." See COA
25 at 12, A.R. at 4193.

26 As this Court concluded in its March 19, 1999 Memorandum Opinion
27 and Order Re Cross-Motions for Partial Summary Judgment, "[t]he
28 COA between the United States and the California DWR for
coordinated operation of the CVP with the State Water Project
recognizes the State's right to divert water from the CVP that
cannot be used or diverted after it fulfills (b)(2) purposes."
See March 19, 1999 Memorandum Opinion and Order at 37-38.

Third, California has long recognized the right of
downstream water users to appropriate water previously put to use
by upstream users. As early as 1862, the California Supreme

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1 Court recognize that downstream water right appropriators could
2 secure a right to the reuse of the return flow from upstream
3 users. Butte T.M. Co. v. Morgan, 19 Cal. 609, 615 (1862). Where
4 a change of place of use or point of diversion reduces the return
5 flow relied upon by downstream users, the California Supreme
6 Court has enjoined the diversion. Scott v. Fruit Growers Supply
7 Co., 202 Cal. 47, 50, 52-53 (1927). Section 1202 of the
8 California Water Code codifies this rule and provides that
9 unappropriated water includes "[w]ater which having been
10 appropriated or used flows back into a stream, lake or other body
11 of water." Cal.Wat.Code, § 1202.

12 In addition to this statutory codification of the common law
13 rule regarding reuse, the reasonable and beneficial use
14 requirement contained in Article 10, Section 2 of the California
15 Constitution further justifies the SWP's reuse claim. Reflecting
16 the constitutional provision's policy of maximizing all
17 beneficial uses of water, Section 1257 of the Water Code states,
18 in part, that:

19 "In acting upon applications to appropriate
20 water, the board shall consider the relative
21 benefit to be derived from (1) all beneficial
22 uses of the water concerned including, but
23 not limited to, use for domestic, irrigation,
24 municipal, industrial, preservation and
25 enhancement of fish and wildlife,
26 recreational, mining and power purposes, and
27 any uses specified to be protected in any
28 relevant water quality control plan, and (2)
the reuse or reclamation of the water sought
to be appropriated, as proposed by the
applicant." Cal.Wat.Code, § 1257. (Emphasis
added.)

As the DWR has previously noted, the CVPIA requires
compliance with California law as a first order priority of the

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1 CVP. CVPIA. § 3406(b), 106 Stat. 4706, 4714. During the Senate
2 floor debate over the final version of the CVPIA, Senator Malcolm
3 Wallop inquired as to whether the CVPIA would overturn any aspect
4 of California's reasonable and beneficial use requirement:

5 "MR. WALLOP: Is there anything in the
6 CVP Improvement Act that alters congress'
7 long standing deference to the States in
8 determining reasonable and beneficial uses of
9 water?" 138 Cong. Rec. S17661 (October 8,
10 1992)

11 Senator Bennett Johnston replied that:

12 "MR. JOHNSTON: Nothing in this bill is
13 intended to diminish or expand any authority
14 that California presently has. The State's
15 authority remains unchanged consistent with
16 the law as interpreted in California v.
17 United States, 483 U.S.C. 645 (1978)." Id.

18 Thus, the legislative history directly affirms that the CVPIA
19 does not alter the Supreme Court's holding in California v.
20 United States, nor diminish any pre-existing, state law authority
21 over the federal project. The United States' decision to debit
22 the make-up water it owes to SWP based upon the SWP recapture of
23 released Section 3406(b)(2) water is therefore contrary to
24 California law and the CVPIA.

25 III.

26 The Interim Decision Does Not Respect The Bay-
27 Delta Accord Because It Fails To Extend The United
28 States' Obligation To Provide Make-Up Water To SWP
29 To Water Costs Associated With Joint Federal/
30 State Actions To Comply With The Endangered Species
31 Act.

32 The United States' 1999 Accounting defined the Section
33 3406(b)(2) water dedicated this year to (b)(2) purposes to
34 include reductions in CVP exports due to actions taken in
35 connection with the Delta Smelt biological opinion. The smelt is

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1 a listed species under the Endangered Species Act ("ESA"). See
2 Accounting at 7; March 6, 1995, Delta Smelt Biological Opinion,
3 A.R. at 4484. According to the 1999 Accounting:

4 "The curtailments of CVP exports due to delta
5 smelt biological opinion take provisions are
6 included in this comparison as a debit from
7 the (b)(2) account for this year only. CVPIA
8 allows for Interior to manage (b)(2) yield to
9 help meet the CVP obligations in Endangered
10 Species Act actions. Because of the dual
11 benefit to San Joaquin outmigrating juvenile
12 salmon and the listed delta smelt for the
period during and following the Vernalis
Adaptive Management Plan releases, FWS
decided to apply the (b)(2) yield to export
reduction at Tracy Pumping Plant for the
period April 17 through June 23, 1999. This
is discretionary and should not be construed
as setting a precedent." See Accounting at
7.

13 However, the 1999 Accounting expressly declined to include
14 ESA export reductions by the SWP as part of the "(b)(2)"
15 accounting. According to the 1999 Accounting, these SWP export
16 reductions will amount to 330,000 acre-feet for the period of
17 March 1, 1999, through September 30, 1999. Id. Despite the loss
18 of this sizeable amount of water, the Interim Decision has
19 declared that the United States' (b)(2) make-up policy, "does not
20 extend to impacts to the SWP that result from its obligations
21 under . . . the Endangered Species Act." See Interim Decision at
22 9.

23 The United States' decision to exclude these new ESA
24 obligations from its make-up policy is inconsistent with the
25 historic 1994 Principles for Agreement on Bay-Delta Standards
26 Between the State of California and the Federal Government
27 (commonly known as the "Bay-Delta Accord"). This decision by the
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1 United States could have serious consequences for the continuing
2 viability of the Bay-Delta Accord. Under the Bay-Delta Accord,
3 the United States, along with the other signatories to the
4 agreement, agreed that:

5 "Compliance with the take provisions of the
6 biological opinions under the Federal
7 Endangered Species Act (ESA) is intended to
8 result in no additional loss of water supply
9 annually within the limits of the water
10 quality and operational requirements of these
11 Principles." See Bay-Delta Accord at 3, A.R.
12 at 4468. (Emphasis added.)

13 To the extent that the ESA related reductions in SWP exports were
14 due to the take provisions of the Delta Smelt biological opinion,
15 the United States' failure to include such losses as part of its
16 make-up obligation contravenes the spirit, if not the letter, of
17 the Bay-Delta Accord.

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1 CONCLUSION

2 Amicus Curiae DWR is well aware that the issues it has
3 raised in this brief are not expressly part of the (b) (2)
4 accounting question that is before this Court on July 29, 1999.
5 Nonetheless, in fashioning preliminary injunctive relief, this
6 Court has broad equitable powers. DWR respectfully suggests that
7 in considering the form of relief, the Court should not take any
8 action that would impair the United States' obligation to make
9 the SWP whole for losses incurred by the SWP due to good faith
10 efforts by the SWP to coordinate its operations with the CVP
11 during this water year.

12 Dated: July 28, 1999.

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EXHIBIT A

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United States Department of the Interior

FISH AND WILDLIFE SERVICE

2510 El Camino Avenue, Suite 130
Sacramento, California 95811-0340

JUN 8 1 1999

MAY 28, 1999

Mr. Lester A. Snow

Program Manager

CALFED/Bay-Delta Program

Bay Delta Advisory Council

1416 9th Street, Room 1155

Sacramento, California 95814

Subject:

Proposed Acquisition of 50,000 Acre-Foot of Water to Meet Salmon and Steelhead Habitat Objectives

Dear Mr. Snow:

After reviewing the 1999 operations plan offered by the CALFED Operations Group, the U.S. Fish and Wildlife Service hereby proposes that CALFED acquire 50,000 acre-foot of water from parties on the Stanislaus River to assist meeting salmon and steelhead habitat objectives. As you know, Interior has decided to implement Delta Actions 1 and 5 immediately. To carry out these fish restoration measures, Interior needs the cooperation of the State Water Project (SWP). We believe that any impact to SWP water supplies from implementing Delta Actions 1 and 5 needs to be made up. We further believe that we can purchase water on the Stanislaus River for make up that also has beneficial independent fishery utility.

Specifically, we propose using approximately \$3 million of the \$14.5 million of Federal CALFED Bay-Delta funding currently set aside for environmental water acquisitions. Caldale Irrigation District and South San Joaquin Irrigation District have offered 50,000 acre-foot of water to be made available during the 1999 irrigation season at New Melones Reservoir.

The water would be released from New Melones in the summer and fall months during periods particularly beneficial to fish and wildlife resources in the Stanislaus River. To the extent possible, the releases will be coordinated with operation of upstream project reservoirs and export operations to take the released water south into storage. The export and storage of this water in San Luis Reservoir will provide for SWP makeup for assisting in the implementation of (B)(2) actions and additional operational flexibility, allowing, for example, reduced export levels in the winter.

The costs related to this water is \$60 per acre-foot. Neither the Central Valley Project nor the State Water Project will charge for storage costs south of the Delta. This water, however, will have a low storage priority in San Luis Reservoir, meaning that it will be the first to spill if San Luis fills next year.

Purchasing this water will provide potential benefits to fall-run chinook salmon and steelhead in the Stanislaus River. These potential benefits include: (1) improving emigration flows in May and June, 1999 for juvenile chinook salmon; (2) helping to meet water management objectives in

Wayne S. White
Field Supervisor

Wayne S. White

Sincerely,

We, in cooperation with the CALFED Ops Group, intend to present this proposal to the Integration Panel and the Biostratigraphic Roundtable for their consideration and then will request the Policy Group's approval. If you have any questions, please contact Mike Spear at 979-2034 or Wayne White at (916)979-2129.

July through September, 1999 for rearing juvenile steelhead; (3) augmenting all steelhead above in October, 1999 for adult fall-run chinook salmon and (4) if the water is not released during the summer or fall, 1999 it will be batted in New Market Reservoir to be used for fishery purposes next year, in the event 2000 is a dry year. Furthermore, as mentioned above the release and export of this water in the July through October period will likely result in reduced Delta exports in January 2000 during the out-migration of Federally endangered winter-run chinook salmon. State threatened and Federally proposed spring-run chinook, and Federally threatened steelhead trout.

DECLARATION OF SERVICE BY MAIL

CASE NAME: San Luis & Delta-Mendota Water Authority vs.
United States of America, etc., et al. and other
related cases.
USDC, Eastern District, No. CIV F-97-6140 OWW and
No. CIV F-98-5261 OWW (Consolidated)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 28, 1999, I placed the attached **AMICUS CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF WATER RESOURCES** in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California, 94102-3664, for first class mailing that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

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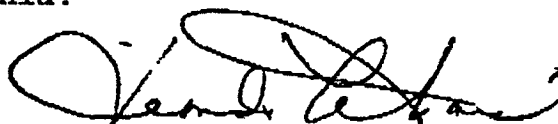
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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on July 28, 1999, at San Francisco, California.



LEONARDO L. DACASIN